

Appendix 7G
Programmatic Agreement

Programmatic Agreement
among the
U.S. Environmental Protection Agency,
U.S. Department of Transportation,
Texas State Historic Preservation Officer,
Tribal Historic Preservation Officer(s) (or other Tribal official)
and the Advisory Council on Historic Preservation
regarding the
Longhorn Pipeline Project in Texas

WHEREAS, the U.S. Environmental Protection Agency (EPA), and the U.S. Department of Transportation (DOT) have agreed to prepare an Environmental Assessment (EA) on the Longhorn Pipeline Project in Texas (hereinafter referred to as the Undertaking); and

WHEREAS, the EPA and DOT have determined that the Undertaking may have an effect on “historic properties” (i.e., properties included in or eligible for inclusion in the *National Register of Historic Places*), and have consulted with the State Historic Preservation Officer (SHPO), applicable Tribal Historic Preservation Officers (THPO) and where there is no THPO other appropriate Tribal officials, and the Advisory Council on Historic Preservation (ACHP), pursuant to Subpart B of the ACHP’s regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (NHPA); and

WHEREAS, the EPA and DOT will, as a part of the EA process, elicit the views of interested federal and state agencies, environmental groups and the public with regard to the Undertaking and its effect on historic properties; and

WHEREAS, the effects on historic properties cannot be fully determined prior to approval of the Undertaking, and this PA addresses all phases of facilities construction for those areas;

NOW, THEREFORE, the EPA, DOT, SHPO/THPO and ACHP agree that this PA is consistent with the provisions of Section 106 of the NHPA, and the Undertaking shall be administered in accordance with the following stipulations in order to satisfy all aspects of EPA’s and DOT’s Section 106 responsibilities.

STIPULATIONS

The EPA and/or DOT shall ensure that the following measures are carried out:

1. Prior to any construction activities within the area of potential effect for the Undertaking, Longhorn Pipeline Partners (LPP) shall consult with the SHPO/THPO to identify all *National Register* or eligible properties that may be affected, directly or indirectly, by subsequent ground disturbing activities, in accordance with the 1983 standards and guidelines of the Secretary of the Interior for Historic Preservation (48 CFR 44734-37). Survey and testing

work shall provide sufficient documentation to assess the eligibility, in consultation with the SHPO/THPO, of the properties for inclusion in the *National Register of Historic Places*. Any unresolved eligibility issue(s) between LPP and the SHPO/THPO will be forwarded to EPA and DOT for submittal to the Keeper of the Register for final determination. LPP shall submit a draft report of survey investigations to the SHPO/THPO for review and comment, prior to initiating test excavations designed to evaluate *National Register* eligibility, in order to allow the SHPO/THPO to comment regarding sites requiring testing. Unless the SHPO/THPO notifies LPP within 30 working days after receipt, the survey investigations shall be considered adequate for Section 106 purposes. LPP shall provide a draft report of test excavations to the SHPO/THPO, with a copy to EPA and DOT, to allow SHPO/THPO's review and recommendation(s) on the *National Register* eligibility of tested sites. Unless the SHPO/THPO objects to it within 30 working days after receipt, the draft testing report shall be considered adequate for Section 106 purposes. If the SHPO/THPO objects or requests additional testing information, the matter will be resolved between LPP and the SHPO/THPO. If the adequacy of testing cannot be resolved between LPP and the SHPO/THPO, it shall be resolved according to stipulation 7, below.

2. For historical and archeological properties determined by the SHPO/THPO, or the Keeper of the Register, to be ineligible for the *National Register*, no protection need be afforded for purposes of Section 106.

3. For affected archeological properties determined eligible for inclusion to the *National Register*, and where it is not possible to avoid the potential adverse effects of the Undertaking, LPP shall:

(a). Develop, in consultation with the SHPO/THPO, and implement a Data Recovery Plan and Research Design (hereinafter referred to as the Plan). The Plan shall be consistent with the Secretary of the Interior's Standards and Guidelines for Archeological Documentation (48 CFR 44734-37) and take into account the ACHP's publication, *Treatment of Archeological Properties*.

(b). The Plan shall include, as appropriate, research, design, controlled earth work, report schedules, monitoring, relocation, preservation, reburial, recordation, and curation of artifacts. It shall specify, at a minimum: a) the property or properties where data recovery is to be carried out; b) any property or properties that will be destroyed, altered or transferred without data recovery; c) research investigations that will be conducted under the approved data recovery plans and, as appropriate, will take into account any previous work conducted or other research in the area, and d) the methods to be used, with an explanation of their relevance to the research questions; e) the methods to be used in analysis, data management, and dissemination of data, including a schedule; f) the proposed treatment of human remains and disposition of recovered artifacts, collections, materials and/or records pursuant to 36 CFR Part 79; g) proposed methods for involving interested parties, including Indian tribes and other Native Americans, in the data recovery; h) proposed methods for disseminating results of the work to interested parties, including Indian tribes and other Native Americans, local governments, or other specific

interested groups; and i) schedule for distribution of progress reports to the SHPO/THPO, EPA and DOT.

(c). LPP shall submit the Plan to the SHPO/THPO, for review and approval, prior to initiating any action that would adversely affect an eligible property. Unless the SHPO/THPO objects within 30 calendar days after receipt, the Plan shall be implemented by LPP. If the SHPO/THPO objects, and/or requests additional information or revisions to the Plan, the matter will be resolved between LPP and the SHPO/THPO. If the matter cannot be resolved, it shall be resolved according to stipulation 7, below.

4. For affected historic properties, other than archeological sites, determined eligible for the *National Register*, and where it is not possible to avoid the adverse effects of the Undertaking, LPP shall, in consultation with the SHPO/THPO and any identified interested parties, including Indian tribes and other Native Americans identified by EPA or DOT, develop a proposal to mitigate the adverse effects of the Undertaking on those properties. Then, LPP shall:

(a). Provide the SHPO/THPO, for review and approval, the mitigation proposal to ensure the recordation, relocation, marketing and/or preservation of the property, taking into account the Secretary of the Interior's Standards for Treatment of Historic Properties (36 CFR 68). In determining what level of documentation to propose, LPP shall first contact the SHPO/THPO and/or the National Park Service (NPS), Intermountain Field Office, 1220 South St. Francis Dr., Santa Fe, New Mexico 87504.

(b). Unless the SHPO/THPO objects within 30 calendar days after receipt, the mitigation proposal shall be implemented by LPP. If the SHPO/THPO objects, or requests additional information or revisions to the proposal, the matter shall be resolved between LPP and the SHPO/THPO. If the proposal cannot be resolved, it shall be resolved according to stipulation 9, below.

5. LPP, in coordination with the SHPO/THPO, shall ensure that all survey, evaluation, data recovery, mitigation, and monitoring are conducted under the direct supervision of a person(s) meeting, at a minimum, the qualifications set forth in the professional qualifications standards in the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation*. If any cultural properties are discovered during construction or related ground disturbing activities, LPP shall ensure that all activities are halted that may adversely effect an cultural property, and immediately notify the SHPO/THPO, EPA and DOT. LPP shall allow the SHPO/THPO a minimum of two working days to inspect the property. Based on the SHPO/THPO's findings, determine with EPA and DOT, appropriate course of action based on PA process beginning at Stipulation 1.

6. EPA and DOT shall ensure that copies of final reports of excavations and other substantive reports are available under the Federal Freedom of Information Act (FOIA) so that members of the interested public, including Indian tribes and other Native Americans, can obtain them to aid in their understanding of local archeology. Copies will be distributed, as requested, to local archeological societies, libraries, universities, and interested Native American groups.

However, EPA, DOT and SHPO/THPO shall withhold any site location data or other data that may be of a confidential or sensitive nature pursuant to the NHPA, as amended.

7. Should LPP or the SHPO/THPO object within 30 calendar days to any plan, proposal, requirement or specification pursuant to this PA, EPA and DOT shall consult with the objecting party to resolve the objection. If EPA and DOT determine that the objection cannot be resolved, EPA and DOT shall forward all pertinent documentation on the dispute to the ACHP. Within 30 days after receipt of all pertinent documentation, the ACHP will: a) provide the EPA and DOT with its recommendation, which EPA and DOT shall take into account in reaching a final decision; or b) notify EPA and DOT that it will comment pursuant to 36 CFR 800.7, and proceed to comment. Any ACHP comment provided in response to such a request shall be taken into account by EPA in accordance with 36 CFR 800.7(c)(2). Any recommendation or comment provided by the ACHP shall be understood to pertain only to the subject of the dispute.

8. Should a member of the public, Indian tribe or other Native American, or other interested person object at any time during implementation of the measures stipulated in this PA, EPA and DOT shall take the objection into account and consult, as appropriate, with the objecting party, the SHPO/THPO, the ACHP, and/or LPP. If EPA and DOT determine the objection cannot be resolved, it shall follow stipulation 7, above.

9. Nothing herein shall preclude LPP from exercising any rights it may have to seek appropriate review of any findings, determination or ruling which may be made by any regulatory authority under this PA.

10. Upon written notice from the SHPO/THPO or the ACHP that any of the conditions of this PA are being violated, the EPA and DOT shall consult with the SHPO/THPO and ACHP to determine how the concern should be resolved.

11. If the EPA, DOT, SHPO/THPO or ACHP finds that the terms of this PA cannot be met, or considers a change or revision to be appropriate, it shall request the other signatory parties to consider an amendment of the PA. All amendments shall be executed in the same manner as the original PA.

12. Any party to this PA may terminate it by providing 30 working days written notice to the other parties, provided that the parties will consult during the period prior to termination to seek amendments or other actions that would avoid termination. In the event of termination, the EPA will comply with 36 CFR 800.3 through 800.6 for this Undertaking.

Execution and implementation of this PA evidences that the EPA and DOT have afforded the ACHP the opportunity to comment and taken into account the effects of Undertaking on historic properties.

Signatories:

the U.S. Environmental Protection Agency

(name) (date)

the U.S. Department of Transportation

(name) (date)

the State Historic Preservation Officer of Texas

(name) (date)

the Advisory Council on Historic Preservation

(name) (date)

Concurring Party:

Longhorn Pipeline Partners, L.P.

(name) (date)

Tribal Signatory (will fill in Tribe names if any want to participate)

(name) (date)

Honorable A. Paul Ortega
President
Mescalero Apache Tribe
P.O. Box 176
Mescalero, NM 88340

Dear President Ortega:

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of Transportation (DOT) are preparing an Environmental Assessment on the proposed Longhorn Pipeline Project (LLP). The project consists of the operation of the pipeline, by Longhorn Pipeline Partners, approximately 99% of which is already in existence. Enclosed is a map of the pipeline.

In accordance with 36 Code of Federal Regulations (CFR) 800, Protection of Historic Properties, we are inviting your tribe to be a part of the Section 106 process. Section 106 of the National Historic Preservation Act requires that Federal agencies take into account the effect their actions may have on historic properties. The enclosed Programmatic Agreement (PA) is the mechanism, under the regulations, that was chosen to ensure that cultural resources are adequately protected over the life of the proposed project. The EPA is coordinating this review with the Texas State Historic Preservation Officer and Tribal Historic Preservation Officers or, if none, other appropriate Tribal officials. While your tribe may no longer have tribal members living in an area affected by the project, a search of historic records shows your tribe may have a historic connection to the land impacted by the project. Under the recently amended 36 CFR 800, Federal agencies must consult tribes when the tribes attach religious and cultural significance to historic properties on or off tribal lands.

Please review this draft PA for any tribal interests and cultural values that should be considered for inclusion in the PA. Also, if the proposed project impacts any properties that your tribe attaches religious and cultural significance to, please document whether the Tribe wishes to be a concurring party to the Agreement. This opportunity for input on the Agreement prior to public comment allows the Tribes the same extent of involvement for actions on tribal lands as the State Historic Preservation Officer has for actions within the State.

We look forward to receiving your response and request that it be provided by September 30, 1999. If you have any questions, please contact Robert D. Lawrence, Chief of the Office of Planning and Coordination, EPA Region 6 at 800-887-6063 or 214-665-2258.

Sincerely yours,

Samuel Coleman, P.E.
Director
Compliance Assurance and
Enforcement Division

Enclosures (2)

cc: Ms. Thora Walsh-Padilla
Director, Office of Env. Protection